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Number 693

In the Supreme Court of the United States

October Term, 1943

L. Metcalf Walling, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

L. Wiemann Company,

Respondent.

Respondent's Brief Opposing Petition for Writ of Certiorari.

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STATUTE INVOLVED.

This case involves the construction of several provisions of the Fair Labor Standards Act of 1938, Chap. 676, 52 Stat. 1060, 29 U. S. C. A., Secs. 203 (b), 206 (a), 207 (a) and 213 (a). These sections are set forth in the Appendix to the Petitioner's petition for a writ of certiorari, page 15.

NATURE OF CASE.

The Petitioner, Administrator of the Act, filed a suit in the District Court of the United States for the Eastern District of Wisconsin, to enjoin the Respondent from violating provisions of the Act in the employment of four warehousemen (stockboys) and six office girls (clerical employees) in its general office and warehouse building in the City of Milwaukee, Wisconsin (Tr. 2-6). The Respondent answered alleging that its business was wholly within the State of Wisconsin in local commerce and that those employees were not covered by the Act because they were not engaged in interstate commerce within the meaning of the Act (Sec. 3b of the Act) and that they were specifically exempt by the exemption provision of the Act exempting employees engaged in a "local retailing capacity" or in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce, Sec. 13 (a) of the Act (Tr. 6-10).

RULINGS BELOW.

The case was tried on the merits and the District Court found that the four warehousemen and six office girls involved (1) were not covered by the Act because they were engaged in *local* commerce, and (2) they were exempt under Sec. 13 (a) of the Act because they were employed in a local retailing capacity and in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce, and dismissed the case. The opinion of the District Court (R. 191-197) is reported in *52 Fed. Supp. 131.*

On appeal, the Circuit Court of Appeals affirmed. The opinion of the Circuit Court of Appeals (R. 211-219) is reported in *138 Fed. (2d) 602.*

QUESTIONS PRESENTED.

1. Are Respondent's four warehousemen and six office girls employed in its general office and warehouse building engaged in interstate commerce within the meaning of Secs. 6 and 7 of the Fair Labor Standards Act?

2. Are such employees of the Respondent exempt under the exemption provision of Sec. 13 (a) of the Act?

STATEMENT OF FACTS.

Petitioner's "Statement" of the case is inadequate. The material facts, as found by the District Court, which are undisputed and not challenged by Petitioner, are briefly as follows:

Respondent is engaged in the local sale of goods at retail to ultimate consumers in sixteen retail "5c to $1.00" stores, all located in the State of Wisconsin—twelve in Milwaukee and one each in Fond du Lac, Green Bay, Racine and Madison, Wisconsin (R. 197).

Respondent also operates a small, two-story general office and warehouse building (30 feet by 110 feet in size) at a separate location in Milwaukee, Wisconsin (Tr. 197). Respondent's business originated many years ago with one or two stores (Tr. 102). Prior to 1938 when Respondent had nine stores (Tr. 103), the general office and warehouse division was located in one of the Respondent's stores in Milwaukee and was operated in the same manner as the present one, and all the activities now carried on at the general office and warehouse building were carried on at that store (Tr. 101-105). In 1938, for convenience, efficiency, and economy, Respondent obtained a separate building to house the general office and warehouse. The sole function of the general office and warehouse building is to house

the Respondent's officers and six office girls on the second floor (which constitutes its general office), and, on the first floor to afford desk space for three buyers, and a small warehouse for the receipt, storage and transfer of approximately 20% of the goods purchased by Respondent, to Defendant's retail stores (Tr. 198).

Respondent's general practice in purchasing goods for its stores is substantially as follows: Merchandise is ordered from within and without the State of Wisconsin. Approximately 80% is delivered directly to the retail stores and 20% is delivered to the warehouse where it stays on an average of ten days and is then distributed to Respondent's retail stores as needed by the stores. The reason some 20% of the merchandise is ordered for delivery to the warehouse instead of directly to the individual stores, is to save freight charges afforded by larger volume shipments of such merchandise and because manufacturers are often unwilling to ship the small quantities required by the individual stores (Tr. 198). The general warehouse is used as a necessary adjunct of the Respondent's retail business for the buying, receiving and storage of goods (Tr. 199-200). All merchandise received at Respondent's warehouse is delivered to, and sold by, only its own retail stores, at retail, within the State of Wisconsin, to the consuming public (Tr. 198, 201).

Respondent's method of selecting goods to be sold in its stores is as follows: Respondent's officers choose the items of goods to be sold in the stores and control the purchasing of the goods (Tr. 148, 198). The Respondent's buyers at the general office prepare and supply the Respondent's store managers with "listings" (called "requests" by Petitioner) describing such goods, and such lists include the prices and the names of the manufacturers. The store managers then prepare separate lists (which for conveni-

ence Respondent sometimes terms "orders") designating the kind and amount of merchandise which, in the judgment of the store managers, can be sold by the stores. These records of the anticipated needs of the retail stores are returned to the general office, where Respondent's officers check and approve or disapprove the kinds and quantities suggested by the managers. Respondent's officers then either forward the store lists as orders to the manufacturers for direct delivery to the various stores, or combine the "listings" into consolidated orders and forward such consolidated orders to the manufacturers for delivery to the Respondent's warehouse (Tr. 12-13, 105-6, 198-9).

Upon arrival at the warehouse, the merchandise is unloaded in the warehouse by common carriers, not by any of Respondent's employees. The four warehousemen employed in the warehouse then unpack, check and distribute the goods into bins assigned to the various stores, or stack the goods upon shelves for later transfer to the bins of the various stores (Tr. 199). (They do not "repack" the goods, as claimed by Petitioner.) The average stay of goods in the warehouse is approximately ten days (Tr. 14, 200).

The amount and dollar value of merchandise contained in the general warehouse is equalled or exceeded by the amount and dollar value of merchandise contained in the stockroom of each of Respondent's retail stores (Stipulation, Tr. 14). In other words, each store has a stockroom as large or larger than the general warehouse.

The six office girls employed in the general office devote a small part of their time, less than 20%, to making out orders or invoices and paying for the goods received from outside the State of Wisconsin. The much greater portion of the work of the six office girls, *over 80% of their time*, is devoted to taking dictation, typing letters, checking invoices, bookkeeping, computing and checking the salaries

of more than 400 employees in Respondent's sixteen stores, preparing sales statements of the stores, checking bank statements and bank deposit slips, taking care of callers in the general office, preparing inventory records and insurance reports, preparing income tax reports, federal O.P.A. reports, various other reports to the federal and state governments, and doing the many other clerical things incidental to Respondent's retail business (Tr. 114, 193, 200). A representative, itemized and detailed description of the work performed by each of the six office girls recorded over a 10-day period which was done by the office girls in the general office for the past four years, was recorded on work sheets by each of the six office girls and received in evidence as Respondent's Exhibits A to F, inclusive (Tr. 163-187). The work of these six office girls is clerical work entirely incidental to the retail functions of the Respondent's business (Tr. 200).

Respondent's entire business is conducted as a single, integrated retail enterprise, and its sixteen stores and the general office and warehouse building together constitute a single retail establishment (Tr. 200). All executive and managerial authority for every phase of the business is conducted from the general office and warehouse building (Tr. 198). This supervision of the stores includes such matters as purchase of goods, control of inventory, fixing the selling price of goods, handling personnel and payrolls, payment for goods, control of advertising, display of merchandise, physical arrangement of the stores, and the preparation of numerous government reports. In fact, every phase of the business of the stores is conducted or supervised from the general office and warehouse building (Tr. 105-120). Employees are transferred between the various stores and between the stores and the general office and warehouse building (Tr. 200).

All goods delivered to the warehouse come to rest upon delivery to the warehouse door and their interstate journey ends when the goods are unloaded from the trucks at the warehouse door (Tr. 201).

Argument Against Granting the Writ.

Consideration of the facts here involved, examination of the provisions of the Fair Labor Standards Act here involved, and application of elementary rules of what constitutes interstate commerce, plainly show that the decision below is correct. There is, therefore, no basis for certiorari. None of the requirements of Rule 38 of this Court for granting certiorari are present here: (1) There is no conflict with applicable decisions of this Court; (2) there is no conflict with the decision of another Circuit Court of Appeals on the same matter; (3) this case does not involve a question of law which has not already been settled by this Court. It is upon these three *nonexistent* grounds upon which Petitioner seeks certiorari.

This case is *not*, as Petitioner contends, a "companion case to *Walling vs. Block, No. 685*". In the *Block* case, the central warehouse apparently was engaged in *interstate* commerce because goods were shipped from the central warehouse into other states. Here, Respondent's business is wholly *local* in character.

1.

The decision below does not (a) misapply this court's decision in *Walling vs. Jacksonville Paper Co.*, 317 U. S. 564, nor (b) is the decision in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Walling vs. American Stores Co.*, 133 Fed. (2d) 840.

(a)

Petitioner contends (pp. 7-8) that the decision below misapplies this Court's decision in *Walling vs. Jacksonville Paper Co.*, 317 U. S. 564. On the contrary, the court below *applied and followed* the *Jacksonville* case. That case is clearly against Petitioner's contentions and clearly supports the decision below. In the *Jacksonville* case this Court held that where a wholesaler orders goods in response to *prior orders or contracts from his customers,* such goods remain in interstate commerce even while they are temporarily in the wholesaler's warehouse; but where the wholesaler orders goods not based upon prior orders or contracts from his customers, but merely in anticipation, even though with considerable precision, of future orders or contracts from his customers for their needs, such goods come to rest and interstate commerce ends when the goods reach the wholesaler's warehouse, and from that point on the goods must be treated *like the goods acquired and held by a local merchant for local disposition.* The "prior orders" necessary to support continuity of interstate commerce were held to be orders placed by the wholesaler's *customers* not the wholesaler's *own* orders.

The same rule was applied by this Court in *Higgins vs. Carr Bros. Co.*, 317 U. S. 572—a companion case to the *Jacksonville* case. That case held that warehouse employees of a wholesaler are not in interstate commerce with-

in the Fair Labor Standards Act where the wholesaler purchased goods from within and without the state which were delivered to his warehouse and then sold and distributed by him through his employees, to retail stores within the state; that when the merchandise from without the state was unloaded at the wholesaler's warehouse "*interstate commerce had ended.*"

Here, we have a plainer case in favor of the Respondent than the *Jacksonville* and *Carr* cases. Here, none of the goods are ordered for any customers, but all goods are ordered for the Respondent itself. The so-called "requests" from the store managers are neither "prior orders" nor "prior contracts", or even anticipations of what customers may need. They are mere suggestions to buy goods which the store managers think the stores will be able to sell. The goods shipped to the Respondent's warehouse are shipped in fulfillment of orders placed by the Respondent's general officers, not by the retail stores (though that is of no significance) and designate the warehouse as the final destination, and when the goods arrive at the Respondent's warehouse they are therefore, in the language of the *Jacksonville* and *Carr* cases, "goods acquired and held by a local merchant for local disposition", and when the goods are unloaded at the Respondent's warehouse "interstate commerce has ended".

A substantially similar factual situation was presented in *Walling vs. Goldblatt Bros.*, 128 Fed. (2d) 778 (C. C. A. 7). It was there held that goods ordered by a large retail establishment for delivery to its warehouse and subsequently apportioned among the retailer's intrastate stores, came to rest upon reaching the warehouse and interstate commerce then ended, and that employees engaged in handling the goods thereafter were not covered by the Act. This Court apparently approved that holding, for certiorari was denied. *87 L. ed. 463.*

Both the *Jacksonville* and *Carr* cases clearly hold that after goods have come to rest, interstate commerce cannot revive again by movement of the goods within the state.

In his grasp for more power over more people, the Administrator seeks to wipe out local commerce altogether. To adopt Petitioner's theory would abolish all distinctions between interstate and local commerce developed by the decisions of this Court over the course of more than 100 years. Petitioner's argument is that goods remain in interstate commerce until they reach their ultimate use by the ultimate consumer. Petitioner ignores the fundamental dividing line between interstate commerce and local commerce—that interstate commerce ends when goods have come to rest within a state. It is difficult to conceive how (after goods have come to rest and their interstate character has ceased, as concededly occurred here), interstate commerce is revived by movement of the goods within the state from the owner's own building for his own purposes. The later delivery of merchandise from the Respondent's warehouse to its stores is not, as characterized by Petitioner, "the latter leg of the (interstate commerce) journey" (page 8, Petitioner's brief), nor a "practical continuity of movement" (page 9, Petitioner's brief), nor "a convenient step in their transportation from out-of-state manufacturers to specific retail outlets" (page 10, Petitioner's brief), nor "to funnel a pre-arranged steady flow of goods from the out-of-state manufacturers to the retail stores" (page 11, Petitioner's brief). These fanciful metaphors of the Petitioner are entirely erroneous. The goods shipped to the general warehouse are shipped pursuant to orders designating the Respondent as the consignee and the general warehouse as the final point of delivery. Once the goods arrive at the general warehouse they have arrived at the final destination of their interstate commerce journey. They

have come to rest upon delivery at the warehouse door, and at that moment their interstate character has ended and they have become a part of Respondent's stock in trade, *entirely local in character.*

The foregoing rule of interstate commerce cannot be changed without eliminating all distinctions between interstate and local commerce. After my goods come to rest within the State of Wisconsin, interstate commerce has ended and my moving the goods within the State of Wisconsin, no matter for what purpose and no matter how many times I may move them, so long as they continue to stay in the State of Wisconsin, cannot put them back into interstate commerce. If it did, then all goods would remain in interstate commerce until they reached the ultimate consumer. Congress has not attempted such abolition of local commerce in the Fair Labor Standards Act and of course it could not constitutionally abolish the characteristics of local commerce even if it desired.

Congress intended to regulate the wages and hours of work of employees producing goods for interstate commerce and handling goods while they are on an interstate journey, but not after they have finished their interstate journey. Congress did not undertake the constitutionally prohibited task of regulating local commerce. The wages and hours of employees engaged in local distribution of goods are of concern only to a single state, and state legislation can cope more satisfactorily with the local problems involved than federal regulation.

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of

our federal system". *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30.

> "We cannot attribute to Congress an intent to defy (the Constitution) or 'even to come so near doing so as to raise a serious question of constitutional law.'" *Anniston Mfg. Co. vs. Davis*, 301 U. S. 337, 351-2.

Concededly, goods delivered to the stockrooms of Respondent's stores are in *local* commerce, and employees engaged in those stockrooms are not covered by the Act, and are specifically exempt as retail employees. Yet, the Administrator argues that if a retailer has a *separate* general office and warehouse, the same activities by like employees carried on *there* constitute interstate commerce. That contention to our mind attempts to make an absurd distinction. Why cannot a retailer put his goods in a separate warehouse and have those goods a part of *local* commerce as much as the goods on the shelves of his store? Why may he not carry on general retail functions in a separate building and still be classed in the same category as a retailer with a single store who carries on the same activities in his store? The activities carried on by the Respondent at its general office and warehouse building are carried on by large retailers in one large single store and such activities are, concededly, local, not interstate commerce, and treated as retail functions.

(b)

The decision of the court below is not in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Walling vs. American Stores Co.*, 133 Fed. 2d 840. In the *American Stores* case, the facts were *radically different* from the facts here and therefore led to a different result. There, the company involved was a vast holding

company, operating directly and through subsidiaries and through controlled corporations through many states, *in interstate commerce.* It engaged not only in retailing through its 2300 stores spread over many states, but manufactured and processed food products, operated canneries, machine shops, printing shops, bottle works, garment factories, transport lines, warehouses and many other business activities in numerous states. Its sales were not only to the public but to subsidiary and controlled corporations who were separate legal entities who made separate tax returns, etc. The company sought exemption for its warehouse and factory employees who were engaged in interstate commerce, by claiming that the warehouses and factories were all part of its "retail establishment". *It was held,* that such a tremendous interstate enterprise, even though considered a "single establishment" was more than a "retail establishment"—it was a manufacturer, processor, transporter and distributor as well. For that reason, the Court held that the *warehouses were not a mere adjunct of the company's "retail establishment".* Any language in the opinion in that case lending any support to the doctrine that after goods have come to rest within the state they are still in interstate commerce because those goods are intended to be moved again to retail stores, is contrary to all other pertinent authorities. Respondent no more resembles the economic giant involved in that case than does the little corner grocery store. See *Allesandro vs. Smith Co.,* 136 Fed. (2d) 75 (C. C. A. 6) which followed the *Goldblatt* case and distinguished the *American Stores Co.* case.

2.

The decision below is not inconsistent with the rulings of this court in the *Jacksonville* case.

Petitioner contends (pp. 10-13) that the decision below is inconsistent with the rulings in the *Jacksonville* case. On the contrary, not only is the decision below *not* inconsistent with the rulings in the *Jacksonville* case; rather it applies and follows those rulings. Nothing said in the *Jacksonville* case gives any support to Petitioner's contentions here. Here we have a far stronger case of local commerce than in the *Jacksonville* case.

Petitioner's theory is, in reality, based upon the "prior order" rule, though Petitioner cleverly refrains from actually saying so (he did say so in the lower courts) because the "prior order" rule does not apply here. The "prior order" rule is not contrary to the "come-to-rest rule". Under the "prior order" rule, goods shipped from without the state are not deemed to come to rest until they have reached the person who gave the prior order. The wholesaler's, warehouseman's or retailer's transfer of goods within the state to fill his customer's *prior order* is still interstate commerce until the goods reach the customer, because the former is then still deemed to be but an intermediary between the shipper who shipped the goods from another state and the customer who gave the "prior order". But, the Respondent is not an *intermediary* between its own stores and its general warehouse. Its orders for goods are not "prior orders" for a number of reasons:

(1) The Respondent, not its stores, gives the orders for delivery to the warehouse.

(2) Respondent orders for itself (even though ordering for its stores because its stores are its own property), not for its customers.

(3) Orders for goods shipped to the warehouse designate *the warehouse as the final destination.*

The Respondent's method of ordering goods does not continue the goods in interstate commerce after they are delivered to the warehouse. Even if the "listings" or "requests" made by the managers and turned in the general office for the purpose of obtaining the listed goods be called "orders", they are not like "prior orders" from third persons within the "prior order" rule of interstate commerce.

Firstly, the managers' requests are not "orders" at all. They are suggestions to Respondent's officers for the kind and quantity of goods to order in anticipation of the needs of Respondent's retail stores. Respondent is the owner of the retail stores, and when it orders goods for the stores it is not the agent of the store managers to place orders for the stores. On the contrary, the *managers* are the *Respondent's* agents and when Respondent orders goods, it orders the goods for itself, not for sale to its stores. Respondent does not "sell" its goods to its stores (Tr. 118). And, obviously, one cannot sell to oneself. (*White vs. Jacobs Pharmacy Co.,* 47 Fed. Supp. 298, 300 (D. C. Ga., 1942.)

Secondly, even if the managers' requests to the general office be called "orders", they are not "*prior* orders". A retailer's (or any other dealer's) order, no matter how many preliminary steps he may go through by acts of his employees before sending the order to his shipper, cannot be a "*prior* order". The "prior order" doctrine of interstate commerce necessarily refers to, and requires the existence of a purchase order *prior* to the order the *retailer*

places. For, if an order for oneself could be a "*prior* order" then the word "prior" is a misnomer and misleading, and the "prior order" rule would apply to *all* orders not merely *prior* orders. "Prior order" means the order the purchaser gets from *his customer* before placing his own order to fill *the customer's "prior order"*. Obviously, Respondent's retail stores are not its customers, for one cannot be one's own customer. The consuming public are Respondent's customers. Respondent buys goods on "order" but never to fill "*prior* orders". It is a matter of common knowledge that 5c to $1.00 stores like the Respondent's, never fill "prior orders" when ordering goods. The items such stores handle are too small for the customers to be placing "prior orders" or for such stores to accept them.

Thirdly, under the "prior order" doctrine, goods shipped to fill "prior orders" remain in interstate commerce until they are delivered at the point required to fill the "prior order". When delivery is made at the point required to fill the "prior order" interstate commerce ends. Here, admittedly, the Respondent's orders for goods to be shipped to the warehouse designated the warehouse, not the retail stores, as the final point of delivery for those goods, and were always filled by delivery to the warehouse. The orders did not specify any *particular goods* for any *particular retail store,* and when the goods were delivered at the warehouse they were not destined for any particular retail store. Hence, even if the store managers' requests for goods be tortured into "prior orders", still those orders were filled and the goods came to rest and ended their interstate character when they reached the warehouse. When the goods reach Respondent's warehouse in Milwaukee, they have reached the only customer for whom they have been purchased—the Respondent—and from then on, in the

language of the *Jacksonville* case, interstate commerce ended and the goods were like "goods acquired and held by a local merchant for local disposition".

If the "prior order" rule be applied to one who orders goods for himself, then all goods ordered in interstate commerce will never get out of interstate commerce until they reach the ultimate consumer. Goods on the retailer's shelves would still remain in interstate commerce. For no goods are ever purchased by anybody without first placing an "order". Every retailer who runs but one store, no matter how small, either himself or through an agent, orders such goods as he believes the public will buy, and has some little "office" and some "warehouse" space to keep his goods, besides his display shelves. That the foregoing is the proper limitation upon the "prior order" doctrine and that under the facts here interstate commerce ended when the goods were delivered at Respondent's warehouse, and that the Respondent's employees here involved do not come within the scope of the Act was expressly held in the *Jacksonville* and *Carr* cases and with practical unanimity in about a score of like cases decided by the lower federal courts.

3.

Respondent's retail stores and general office and warehouse building together constitute a "single retail establishment" whose employees are exempt under Sec. 13 (a) of the Act.

Since the general office and warehouse employees are not engaged in interstate commerce, they are not covered by the Act. But, in addition, they are specifically exempt from the Act because the general office and warehouse building is but a part of Respondent's "retail or service estab-

lishment'' as defined by the exemption provision, Sec. 13 (a) of the Act.

With practical unanimity, the cases[1] which have considered a business set-up like the Respondent's have held that the retail stores and and the central office and warehouse of such a retailer constitute a "single retail establishment'' within the Act. Analogous statutes (involving unemployment compensation) using the term "establishment'' have been construed likewise in recent cases[2].

The legislative background of the Act indicates that the term "retail establishment'' was used in a broad sense to include a retailer's central office and warehouse building.

Retail employees, whether working in the retail outlet, central office, a warehouse or any other building operated by a retailer, are commonly treated as one labor group. In matters other than labor policy, the divisions of a business enterprise like the Respondent's are treated collectively as one "retail establishment''. Obviously, if each physically segregated store or division of Respondent's business enterprise were regarded as a separate establishment anomalous and confusing results would follow.

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[1] **Allesandro vs. Smith Co.,** 136 Fed. (2d) 75 (C. C. A. 6); **Veazey Drug Co. vs. Froemming, Administrator,** 42 Fed. Supp. 689 (D. C. Okla. 1941); **Duncan vs. Montgomery Ward,** 42 Fed. Supp., 879 (D. C. Tex., 1941); **White vs. Jacobs Pharmacy,** 47 Fed. Supp. 298 (D. C. Ga., 1942); **Walling vs. Block,** 139 Fed. (2d) 268 (C. C. A. 9).

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[2] **Spielmann vs. Industrial Commission,** 236 Wis. 240 (involving separate Nash Motor Co. plants, 30 to 40 miles apart, which were held to be a single "establishment"); **Chrysler Corp. vs. Smith,** 297 Mich. 438 (involving separate Chrysler plants, 11 miles apart, which were held to be a single "establishment").

CONCLUSION.

The rulings made by the District Court and the Circuit Court of Appeals are entirely correct, in accordance with well settled principles of law and followed the decisions of this Court. There is therefore, no basis for granting certiorari.

Respectfully submitted,

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